92-865

Supreme Court, U.S.
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CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CHARLES WILLIAM O'BRIEN, et al.,
Petitioner,

v.

BANK ONE, COLUMBUS, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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September, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio Civil Rule 3(A) commencement requirement that service be obtained within one year of filing in order to properly commence an action is extended by the filing of an Amended Complaint and, thus, accords due process.

2. Whether refusal to mail court filings and/or refusal to re-mail court filings by ordinary mail after certified mailing of such filings have been returned to opposing counsel as "unclaimed", constitutes notice of such filings sufficient to accord the affected party due process.

THE PARTIES

The parties are Petitioner, Charles William O'Brien and Bank One, Columbus, N.A.

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OPINIONS BELOW

The prior opinion most pertinent to this Petition and the judgment under review is the December 31, 1991 decision of the 10th District Court of Appeals of Ohio, Bank One, Columbus, N.A. v. Charles William O'Brien, et al., 91AP-166; 91AP-441 (unreported). A petition for discretionary review was denied by the Supreme Court of Ohio on May 27, 1992. The decision under review and the order denying review are reproduced in the Appendix of this Petition.

JURISDICTION

The Entry of the Ohio State Supreme Court was journalized on May 27, 1992. This Petition was filed within 90 days of May 27, 1992, including the extension. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

On November 18, 1990, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $268,000.00.

On August 18, 1981, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $920,000.00.

On February 5, 1982, Charles William O'Brien and Karen Sue O'Brien executed and delivered to Bank One a Promissory Note in the amount of $421,000.00.

On the foregoing dates, Karen Sue O'Brien was the title holder of certain improved parcels of real estate. Prior to the execution and delivery of the Note dated November 18, 1980, Bank One requested of Charles William O'Brien that copies of all title descriptions regarding the aforementioned real estate be provided to Bank One to enable the bank to determine what, if any, collateral could be secured. Bank One then proceeded, unilaterally, to attach all of Karen Sue O'Brien's real estate as collateral for the loans by attaching the property descriptions to the Mortgage Deeds, after such documents were signed, and without consent, permission or knowledge of Karen Sue O'Brien or Charles William O'Brien.

In June, 1982, Bank One received $100,000.00 from the sale proceeds of the personal residence of Karen Sue O'Brien and Charles William O'Brien. Prior to the closing, Bank One

executed and delivered two sets of partial releases. One set of releases pertained to the aforementioned property which was sold. The second set released the family residence as well as all those properties wrongfully encumbered by Bank One in 1980, 1981 and 1982.

In late 1986, with the passage of tax laws changing the real estate industry, Karen Sue O'Brien gave all her properties to various personal and corporate entities belonging to her children, Holly, Kelly and William O'Brien (O'Brien Entities). Thereafter, from January, 1987 to January, 1989, the loans with Bank One remained current and principal was substantially reduced.

During the years following the gift of the properties to the O'Brien children, the second set of releases was filed and the various properties were re-financed with other lenders.

During the years following the gift of the properties, Bank One accepted numerous checks representing payments in full of interest and principal on the Promissory Notes, all other

interest and principal being current as of January of 1989.

However, Bank One continually failed and refused to apply sizeable payments to principal on the loans targeted by Charles William O'Brien. Instead, Bank One, at its own discretion, used the monies to pay off lower interest bearing loans which were unsecured. Regrettably, although the loans were current as of January, 1989, Bank One refused to alter its course of self-dealing and misapplication of payments. Charles William O'Brien notified Bank One in writing that unless and until Bank One reconciled the payments and their misapplications, no further monies would be forthcoming.

In disregard of the rights of Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities, Bank One filed a Complaint seeking judgments on three "Cognovit" Notes signed by Karen Sue O'Brien and Charles William O'Brien and obtained judgment on March 17, 1989.

On April 5, 1989, Charles William O'Brien, acting on behalf of himself, filed an Ohio Civil Rule 60(B) Motion for

Relief from the March 17, 1989 Judgments.

On May 18, 1989, Bank One moved for leave to file an Amended Complaint.

On June 7, 1989, the Trial Court granted the Motion for relief, indicating that if the allegations contained in the Motion were true, Bank One could be barred from any judgment. Bank One was also given leave to amend.

On August 3, 1989, Bank One instructed the Clerk of the Courts to serve Karen Sue O'Brien by certified mail. On the same day, Bank One requested that the Clerk of Courts serve the O'Brien Entities by ordinary mail.

On February 27, 1990, Bank One instructed the Clerk to personally serve its Amended Complaint upon Karen Sue O'Brien and the O'Brien Entities.

On April 9, 1990, Bank One instructed the Clerk of the Common Pleas Court to issue summons and a copy of the Amended Complaint for service by ordinary mail upon WKH Corporation, HWK Corporation and Jasper Investment

Corporation all C/O Tammy M. Cordell, Statutory Agent.

On April 25, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve by publication Karen Sue O'Brien, F & S Properties and HKW Properties. On April 27, 1990, Bank One instructed the Clerk of the Common Pleas Court to serve WKH Corporation, HWK Corporation and Jasper Investment Corporation by personal service. On May 8, 1990, the notice of receipt of personal service of summons on HWK Corporation, WKH Corporation and Jasper Investment Corporation all C/O Kelly P. O'Brien was filed.

On June 22, 1990, Bank One moved for leave to file its Second Amended Complaint.

At a July 27, 1990, hearing the Trial Court took Bank One's Motion to file its Second Amended Complaint under advisement; ordered that Charles William O'Brien respond to Bank One's interrogatories and produce documents responsive to Bank One's request for production of documents in ten days from the date of the hearing; indicated that Charles William

O'Brien, WKH Corporation, HWK Corporation and Jasper Investment Corporation had not responded to Bank One's Amended Complaint and were in default; granted Charles William O'Brien and the aforementioned corporations seven days within which to answer Bank One's Amended Complaint; and reaffirmed the trial date of January 28, 1991.

On August 8, 1990, the O'Brien Entities moved to dismiss the action against them.

On September 5, 1990, the Trial Court granted Bank One's Motion for leave to filed its Second Amended Complaint.

On September 5, 1990, the Trial Court journalized its orders from the July 27, 1990 hearing, ordering that: WKH Corporation, HWK Corporation and Jasper Investment Corporation respond to the Amended Complaint by August 8, 1990; and the trial date of January 28, 1991 was reaffirmed.

On September 6, 1990, Bank One filed its Second Amended Complaint and instructed the Clerk of the Common Pleas Court to serve the Second Amended Complaint by

publication upon Karen Sue O'Brien, F & S Properties and HKW Properties.

On January 28, 1991, Bank One filed its Motion for Default Judgment and Dismissal against Karen Sue O'Brien, Charles William O'Brien and the O'Brien Entities.

On January 29, 1991, the Trial Court, by Journal Entry, denied the O'Brien Entities' Motion to Dismiss and ordered them to answer Bank One's Second Amended Complaint within 14 days.

On February 12, 1991, the Trial Court signed the Entry of Judgment as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the Trial Court signed a Judgment Entry of Foreclosure as against Karen Sue O'Brien and Charles William O'Brien and the O'Brien Entities.

On February 12, 1991, the O'Brien Entities filed their Notice of Appeal to the Tenth Appellate District Court of Franklin County, Ohio.

On March 11, 1991, the Trial Court entered an ex parte Amended Judgment Entry and Decree in Foreclosure.

The Tenth Appellate District Court of Franklin County, Ohio, reached a decision on December 17, 1991 which indicated that the filing of an Amended Complaint, even though outside the Civil Rule 3(A) requirement that service must be obtained within one year of the filing of the original Complaint, extended the one year cut-off for such service.

Bank One filed its initial action against Charles William O'Brien and Karen Sue O'Brien on March 17, 1989. Bank One's First Amended Complaint was filed on June 9, 1989 and it Second Amended Complaint was filed on September 6, 1990. On September 6, 1990, counsel for Bank One instructed the Clerk to make service by publication on Karen Sue O'Brien. At all times relevant, Bank One could have instructed the Clerk to make service by publication within one year of the initial filing. Bank One failed to obtain service on the person of Karen Sue O'Brien, and as a consequence, the initial action was not

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upon the Secretary of State pursuant to Ohio Revised Code Section 1701.07(H). Bank One was imprudent and dilatory in its attempts at service as either of the above-mentioned attempts at service would have guaranteed service with the one year requirement of Civil Rule 3(A).

Bank One's Amended Complaints of June 7, 1990 and September 6, 1990 were not new or re-filed Complaints and they both related back to the initial filing of March 17, 1989. The O'Brien Entities relied upon established Ohio case law and refused to enter the fray, particularly as such O'Brien Entities were not in privity with Bank One and owed Bank One no monies.

Ohio law deems completion of service of Civil Process as the prerequisite to the commencement of an action. Completion of service determines the Court's authority: State ex rel. Balson v. Harnishfeger (1978), 55 Ohio St. 2d 38.

For a Court to acquire jurisdiction, there must be proper service of summons and a judgment rendered without proper service is a nullity and void: State ex rel. Ballard v. O'Donnell

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REASONS FOR GRANTING THE WRIT

The underlying case was filed by Bank One on March 17, 1989. After the passage of more than one year, Bank One had not obtained service upon any of the O'Brien personal or corporate Entities - solely due to Bank One's failure to follow the provisions contained in Ohio Civil Rule 4, et seq. to obtain such service - which includes but is not limited to service by publication or, in the case of the corporate entities, service upon the Secretary of State pursuant to Ohio Revised Code Section 1701.07(H). Bank One was imprudent and dilatory in its attempts at service as either of the above-mentioned attempts at service would have guaranteed service with the one year requirement of Ohio Civil Rule 3(A).

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For a Court to acquire jurisdiction, there must be proper service of summons and a judgment rendered without proper service is a nullity and void: State ex rel. Ballard v. O'Donnell (1990), 50 Ohio St. 3d 182 following Lincoln Tavern, Inc. v. Snader (1956), 165 Ohio St. 61 at page 64.

It is the completion of original process which is essential to clothe Trial Court with jurisdiction to proceed: Baldine v. Klee (1968), 14 Ohio App. 2d 181; Lash v. Miller (1977), 50 Ohio St. 63 followed at O.B. Corporation d/b/a Lincoln Village Lanes v. Cordell, Case No. 87AP-1184, unreported Franklin County, Court of Appeals (1988).

within the reasonable time of one year, Maryhew v. Yova, supra.

Within the first year of Bank One's initial filing on March 17, 1989, Bank One did not reasonably undertake to avail itself of any adequate or prudent measures to obtain service under the Ohio Civil Rules, Rule (4), et seq. or under the statutory provisions pursuant to Ohio Revised Code Section 1701.07(H) which provide that service upon a corporation may be effectuated by certified mail service upon the Secretary of State.

Until the Tenth District Court of Appeals decision rendered December 17, 1991, the O'Brien Entities were on solid ground. The Supreme Court of Ohio had decided a string of related cases supporting the O'Brien Entities' position - particularly in light of the dilatory conduct by Bank One.

During the course of the first appeal, the Supreme Court of Ohio handed down a decision in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d, 549. It is upon the

her failure to do so would not have waived her right to affirmative defense of lack of personal jurisdiction: Maryhew v. Yova, 11 Ohio St. 3d 154.

Inaction upon part of the Defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with necessity of service. The Civil Rules do not change this common law of Ohio: Maryhew v. Yova, supra.

The philosophy of Civil Rule 3(A) is that the Court dockets should be cleared if service has not been attained within the reasonable time of one year, Maryhew v. Yova, supra.

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be effectuated by certified mail service upon the Secretary of State.

Until the Tenth District Court of Appeals decision rendered December 17, 1991, Karen Sue O'Brien and the O'Brien Entities were on solid ground. The Supreme Court of Ohio had decided a string of related cases supporting Karen Sue O'Brien and the O'Brien Entities' position - particularly in light of the dilatory conduct by Bank One.

During the course of the first appeal, the Supreme Court of Ohio handed down a decision in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d, 549. It is upon the Goolsby case that Bank One and the Tenth District Court of Appeals upheld service upon Karen Sue O'Brien and the O'Brien Entities via extension of the requirements of Ohio Civil Rule 3(A).

It will be important, therefore, to analyze Goolsby and discuss why that decision sets an inappropriate standard for service in Ohio as adopted by the Appellate decisions in this

case and, consequential denial of due process.

Bank One, depending upon Goolsby, argued and the Appellate Court adopted the idea that successive amendments to an initial Complaint can cure the failure of service defects under Ohio Civil Rule 3(A) by extending the time for commencement of an action. Bank One used successive amendments to its original Complaint to circumvent the requirements of Ohio Civil Rule 3(A) and the existing Ohio case law upon which Karen Sue O'Brien and the O'Brien Entities relied.

In the Goolsby case, Plaintiff Goolsby filed her Complaint on February 6, 1986 and asked the Clerk to refrain from service; gave instructions for service on July 17, 1987, obtained service on July 23, 1987, then turned around and dismissed the action pursuant to Ohio Civil Rule 41(A)(2) with approval of the Trial Court. On July 27, 1989, Plaintiff Goolsby refiled her Complaint pursuant to Ohio's Saving Statute, Revised Code Section 2305.19 and a subsequent

Motion by the Defendant to dismiss pursuant to Civil Rule 3(A), i.e., lack of timely commencement, was granted.

The holding in Goolsby did not reverse or modify any of the aforementioned cited cases which require service within one year to achieve commencement. Goolsby did not apply or address the issue of an Amended Complaint. The Goolsby Trial Court allowed Plaintiff Goolsby to continue the action despite her dilatory instruction to the Clerk not to issue a summons. Then, the Goolsby Trial Court approved Plaintiff Goolsby's dismissal without prejudice under Ohio Civil Rule 41(A)(2) on November 11, 1988. When Plaintiff Goolsby attempted to refile an identical Complaint on July 27, 1992, the Defendant moved to dismiss the second suit because the second Complaint had not been served within one year of the original filing on February 6, 1986. The sole reason for the reversal in Goolsby was the abuse of discretion of the Trial Court in preventing a trial upon the merits by avoidance of the Savings Statute. This fact is clearly demonstrated by the language of the Goolsby

case.

The Supreme Court of Ohio stated that the Goolsby Trial Court failed to apply the Ohio Civil Rules, particularly Ohio Civil Rule 4(E); that the Goolsby Trial Court should have, upon its own initiative, dismissed Plaintiff Goolsby's Complaint without prejudice as service was neither instructed nor obtained within six months of the initial filing; that Ohio Civil Rule 3(A) is designed to clear the dockets of cases in which a Plaintiff has not pursued service upon a Defendant; that in most instances, the rule would be applied when a Plaintiff has neglected to again attempt service after original service of process fails; that it was beyond question that the rule should have been applied in the Goolsby action where the Clerk was instructed to refrain from attempting service.

However, the Goolsby Trial Court did not act pursuant to Ohio Rule either by its inaction or by its action. By its inaction, the Goolsby Trial Court allowed Plaintiff Goolsby to file her Complaint, wait over one year and 5 months to instruct

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within six months after filing if no "proceedings" have been "taken therein." However, in Twardowski v. Cooper, Unreported, No. 8105 (Ohio Ct. App. Second Dist., filed May 2, 1983) the court held that M.C. Sup. R. 6 could not be relied upon in order to dismiss an action when service of process had not been effectuated in six months. The court stated that the one-year provision of Rule 3(A) to perfect service of process in civil actions prevails over M.C. Sup. R. 6. Rule 4(E) was undoubtedly intended to supersede the holding in the Twardowski case and at the same time avoid conflict with Rule 3(A). The reasons are several."

"First, M.C. Sup. R. 6 is not specifically directed to service of process nor does it state whether a dismissal pursuant to the rule is or is not without prejudice. In light of the wording of M.C. Sup. R. 6, the Twardowski case was correct in holding that the six-month M.C. Sup. R. 6 provision conflicted with the one-year provision of Rule 3(A). In contrast, Rule 4(E) is specifically directed to service of process

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prejudice, thereby causing Plaintiff Goolsby to refile her case.

Ohio Civil Rule 4(E) states:

"Effective July 1, 1984, Rule 4(E) was added to Rule 4 by amendment. The new subdivision, patterned after recently adopted Federal Civil Rule 4(j), provides that if the summons and complaint are not served upon a defendant within six months and the plaintiff, attempting in-state service of process, cannot show good cause why service was not effectuated, the court shall dismiss the action without prejudice."

"It should be noted that Rule 6, of the Common Pleas Court and Municipal Court Superintendence Rules, has provided at least since 1979 that an action may be dismissed within six months after filing if no "proceedings" have been "taken therein." However, in Twardowski v. Cooper, Unreported, No. 8105 (Ohio Ct. App. Second Dist., filed May 2, 1983) the court held that M.C. Sup. R. 6 could not be relied upon in order to dismiss an action when service of process had not been effectuated in six months. The court stated that the

one-year provision of Rule 3(A) to perfect service of process in civil actions prevails over M.C. Sup. R. 6. Rule 4(E) was undoubtedly intended to supersede the holding in the Twardowski case and at the same time avoid conflict with Rule 3(A). The reasons are several."

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"Second, Rule 4(E) is merely an administrative regulation applicable only to civil cases involving in-state

service of process. The rule is directed toward clearing the docket of those non-diligent plaintiffs who neglect follow-up, in-state process then original in-state service of process fails. The rule does not apply to the more time-consuming procedures involved in out-of-state or foreign service of process. The fact that Rule 4(E) is of limited application indicates its administrative, docket-clearing purpose."

"Third, because a Rule 4(E) dismissal is a dismissal without prejudice, thus affording a party the opportunity to file over again, such a dismissal does not conflict with Rule 3(A). Rule 3(A) bars an action only if service of process has not been effected within one year after the filing of the complaint. Lash v. Miller (1977), 50 O.S. 2d, 63."

"Whether the docket-clearing function of Rule 4(E) is necessary may be questioned. As noted the rule applies only to in-states cases. In a busy municipal court, clearing the docket of many neglected, poorly prosecuted small cases may be beneficial from the standpoint of efficient judicial

administration. On the other hand, if a case is dismissed without prejudice pursuant to Rule 4(E) six months after the complaint is filed and the statute of limitations in the cause has run, the dismissed plaintiff will have at least one year to file over again under the savings statute, RC Section 2305.19. In short, in light of a Rule 4(E) dismissal the plaintiff will have longer to perfect service of process than would be possible under the one-year limitation of Rule 3(A)."

The Supreme Court of Ohio stated that it was "unfortunate that this case (Goolsby) demands resolution of a situation that would have been avoided had the Civil Rules been applied by the trial court below." In other words, the Goolsby case was decided upon the improper use of Civil Rule 3(A) to void the Savings Statute and dismiss the second Complaint. Goolsby had nothing whatsoever to say about whether an Ohio Civil Rule 3(A) dismissal would have been proper after one year had expired without service after the filing of the initial Complaint. Goolsby did say, however, that

Having distinguished Goolsby, it is obvious that Ohio law regarding commencement and service has not been changed thereby. Goolsby addresses the very narrow issue of the preservation of an action under the Limitations and Savings Statutes, Ohio Revised Code Sections 2305.10 and 2305.19. In Goolsby, the Supreme Court of Ohio sought only to reverse the Goolsby Trial Court's inconsistent decisions regarding the aforementioned statutes based upon an improper application of Ohio Civil Rule 3(A).

CONCLUSION

Bank One failed to timely acquire service upon the O'Brien Entities. Pursuant to Ohio Civil Rule and case law, there was no actual notice of the suit to the O'Brien Entities and the trial court lacked authority to render any judgment against the O'Brien Entities. The trial court's judgment and the Tenth District Appellate Court's Decision, relying upon Goolsby, squarely conflicts with the requirement of notice and due process as required by Ohio Civil Rule 4 et seq., the

which he failed to do in the first place. Saunders, supra, page 250 with emphasis.

Saunders is still the prevailing view. The decision was not disturbed nor distinguished in the Goolsby Supreme Court decision. Since Bank One used Goolsby solely as an example of the Supreme Court of Ohio's reliance upon Saunders, the August 28, 1991 holding in Goolsby should not be viewed as unfavorable. Further, Goolsby does not consider such issues as successive amendments to initial complaints and the consistent amenability of corporate bodies to service of process under Section 1701.07(H) of the Ohio Revised Code.

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aforementioned statutes based upon an improper application of Ohio Civil Rule 3(A).

As a direct result of Bank One's failure to obtain personal jurisdiction over indispensable party Karen Sue O'Brien, none of the claims or Cross-claims obtained any personal jurisdiction over Karen Sue O'Brien and the Trial Court was not empowered to take any action against or regarding Karen Sue O'Brien or Charles William O'Brien.

Personal jurisdiction of Karen Sue O'Brien was a prerequisite to the proceedings below inasmuch as her presence affected and still affects the interests of Charles William O'Brien, the interests of all other Defendants, and the interest of society in the orderly and efficient administration of justice. Karen Sue O'Brien was and is so indispensable to the proceedings that the Trial Court should have dismissed the action for lack of timely commencement against Karen Sue O'Brien pursuant to Ohio Civil Rule 3(A), Ohio Civil Rule 4(E), Ohio Civil Rule 19 and 19.1.

"Dismissal of a claim for failure to join a necessary party is warranted only where the defect cannot be cured and dismissal pursuant to Civil Rule 12(B)(7) is improper where the party can be joined pursuant to Civil Rule 19(A).", State ex rel. Bush v. Spurlock, 41 O.S. 3d 77, 537 N.E. 2d 641.

"Where an indispensable party cannot be joined for want of jurisdiction over his person, the action should be dismissed without prejudice.", Ricci v. State Board of Law Examiners, 569 F.2d 782.

By virtue of the fact that Karen Sue O'Brien was named as a party Defendant but never joined in the proceedings, as such proceedings never commenced against Karen Sue O'Brien, the Trial Court was without sufficient grounds, under Ohio Civil Rule 19 or 19.1, to proceed against Charles William O'Brien. The Trial Court should have dismissed the action under Ohio Civil Rules 3(A), 4(E), 19 and 19.1. However, by virtue of the Trial Court's error regarding service upon Karen Sue O'Brien and error regarding jurisdiction over her person,

Charles William O'Brien was prejudiced as a result of an improper default judgment taken against Karen Sue O'Brien by the Trial Court.

The defective service issue regarding Karen Sue O'Brien could not be cured by an amendment by Bank One after the expiration of one year from the initial filing. In this regard, Ohio Civil Rule 3(A) controls over Ohio Civil Rule 19 and Ohio Civil Rule 15(A), and, inasmuch as the Trial Court choose to ignore the effect of Ohio Civil Rule 3(A), the lack of personal jurisdiction made Karen Sue O'Brien an indispensable party who, as of the date of the Second Amended Complaint, could not possibly be joined and, as such, the Trial Court erred in proceeding against Karen Sue O'Brien and Charles William O'Brien.

Further, absent such requisite personal jurisdiction, any judgment rendered by the Trial Court against Karen Sue O'Brien is not only reversible error, but void ab initio as a matter of law, (see Lincoln Tavern, Inc. v. Snader, supra; also

see McCormac Ohio Civil Rules, Section 13:27; Demianczuk v. Demianczuk, 20 Ohio App. 3d 244, 30 OBR 305, 485 N.E. 2d 834 (1984); O.B. Corporation d/b/a Lincoln Village Lanes v. Tammy M. Cordell d/b/a Central Ohio Receivable Co., supra; Central Ohio Receivables Co. v. William Huston and Sandra M. Huston, 87AP-1185, Franklin County Court of Appeals; Brian Sirower v. Club South Investment Co., Inc., 88AP-619, Franklin County Court of Appeals; Baldine v. Klee, supra; Lash v. Miller, supra; State ex rel. Broadway Petroleum Corp. v. Elyria, (1969), 18 Ohio St. 2d 33, 27; Maryhew v. Yova, supra; Dairyland Ins. Col. v. Forgus, (1989), 58 Ohio App. 3d 78; Goolsby v. Anderson Concrete Corp., supra. Karen Sue O'Brien was and is an indispensable party to the action and her default status greatly prejudiced Charles William O'Brien in the underlying cause as Karen Sue O'Brien and Charles William O'Brien were and are co-signers on most of documents at issue.

Counsel for Bank One would have the Court believe that the various Amended Complaints filed by Bank One obviated

the requirements for service upon Karen Sue O'Brien prior to March 17, 1990. These arguments do not make any sense. It is obvious that Karen Sue O'Brien was initially named as a Defendant on March 17, 1989 and the Trial Court's Entry of June 7, 1989 made it clear that the First Amendment to the Complaint related back to the issues resulting in the Cognovit Judgments. Further, there is no case law to support any theory that Ohio Civil Rule 15(A) take precedence over Ohio Civil Rule 3(A), particularly in light of the foregoing circumstances.

Petitioner Charles William O'Brien was not served with any of Bank One's filings from September 17, 1990 through January 25, 1991. Counsel for Bank One unilaterally refused to make these filings available and was improperly granted judgment by default against Charles William O'Brien by the Trial Court. Incredulously, this denial of notice was upheld by the Tenth District Court of Appeals of Ohio and ignored by the Supreme Court of Ohio.

Ohio Civil Rule 5(A), service when required.

Staff Note: 1970:

"Rule 4(B) provides that a copy of the complaint as well as the summons shall be served on the defendant. Rule 5(A) simply requires that a copy of the subsequent pleadings, written motions, and other important papers be served upon the opposite party, unless the court otherwise orders because the parties (Rule 5(C)) are too numerous. Rule 5(A), then, enhances fair notice by requiring that all important papers subsequent to the original complaint be served on the opposing party or his attorney and relieves the opposing attorney of the time-wasting necessity of checking the file in the clerk's office to determine whether an important paper has been filed. More importantly, the service of copies of the papers set forth in Rule 5(A), with few exceptions, establishes the beginning of the time period during which a party must comply with a particular order or complete a particular act."

Ohio Civil Rule 5(B), service how made.

Staff Note: 1970:

"Rule 5(B) describes the methods for service of copies of pleadings, written motions, and papers subsequent to the original complaint. The attorney for the responding party may serve a copy of his pleading or paper on the attorney for the opposite party by handing it to him or by leaving the copy at his office, or by mailing the copy to the opposing attorney. Service of the copy is complete when delivered or when posted in the United States mail. If a copy of the pleading or paper is delivered personally to the attorney for the opposing party, the time for the opposing party to complete a particular act begins to run. If a copy of the pleading is mailed to the attorney for the opposing party, the time for the opposing party to complete a particular act is delayed under Rule 6(E) for three days. The key act is the delivery or mailing of a copy of the particular pleading, or written motion, or important paper."

"Every written motion other than one which may be heard ex parte must be served upon each of the parties, Civil Rule 5(A)."

"Service upon either the attorney or a party may be made by ordinary mail and service is complete upon mailing, Ohio Civil Rule 5(B)."

"If service is made by mail, three additional days are added to the time provided for the performance of any act by the recipient base on service of the motion, Ohio Civil Rule 6(E)."

"All papers, including motions after the complaint are required to be served upon a party shall be filed with the court within three days after service, Ohio Civil Rule 6(D). Service is now the act that determines time for subsequent action, but it is necessary that the court have a complete file on a current basis. The papers filed with the court must have proof of service endorsed thereon. The proof of service shall state the date and manner of service and shall be signed in accordance

with Ohio Civil Rule 11. The court will not consider any papers which are filed without proof of service endorsed thereon", McCormac Ohio Civil Rules Practice, Section 6.07.

The service requirements of Ohio Civil Rule 5(A), (B) and Ohio Civil Rule 11 are clear. Service of filings subsequent to the Complaint must be made upon an opposing party by ordinary mail. Service of ordinary mail can be complete when posted but certified mail requires an additional step in that certified mail must be signed for by the person to whom it is mailed or an authorized agent. If certified mail is not claimed within 14 days, it is returned to the sender as "unclaimed". Therefore, unclaimed certified mail is not posted in the same sense that ordinary mail is posted on the day of its mailing and does not qualify under Ohio Civil Rule 5(B) for service of papers subsequent to the Complaint.

Additionally, the Staff Note Amendment of July 1, 1971 to Ohio Civil Rule 4.6(C) deals with certified mailings of the Complaint which are returned "unclaimed", stating that in the

event such certified mail is returned unclaimed, ordinary mail must follow in order to complete service. Relatedly, all certified mailings by counsel for Bank One which were returned unclaimed, even though improper under Ohio Civil Rule 5(A)(B), should at the very least have been re-mailed by ordinary mail. This was not done and Petitioner Charles William O'Brien never received these filings.

Counsel for Bank One intentionally continued certified mailings of the aforementioned filings in order to deprive Petitioner Charles William O'Brien his rights to due process. This fact is made more evident by counsel for Bank One's refusal to hand over the "unclaimed" envelopes containing such filings to Petitioner Charles William O'Brien's secretary after they had been returned by the postal authorities upon an elapsed time of fourteen days.

Ohio law is clear on this issue. Requirements of due process and Ohio Civil Rule 5(A) mandate that any pleading submitted to the Court be brought to the opposing party's

attention, Sperry v. Hlutke, 19 O.App. 3d 156, 19 OBR 246, 483 N.E. 2d 870.

Ironically, the Franklin County Court of Appeals 17 years earlier rendered a decision which remains intact regarding this very issue in Charles William O'Brien v. University Tenants Union, et al., (March 27, 1975, No. 74AP-427, No. 74AP-271 and 74AP-502 (unreported)(pertinent excerpts of decision attached in Appendix, page nos. A-43 and A-44).

It is clear from the existing Ohio Civil Rule 5(A)(B) and its Staff Notes, 11, Ohio Civil Rule 4.6(c) and Ohio case law that Petitioner Charles William O'Brien was denied the filings upon which Petitioner Charles William O'Brien's absence of response was construed as grounds for default judgment. Petitioner Charles William O'Brien had no duty or ability to respond to unserved filings.

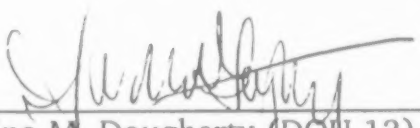
CONCLUSION

Bank One failed to timely acquire service several indispensable parties, without whom, no judgment against Petitioner Charles William O'Brien was proper. Pursuant to Ohio Civil Rule and case law, there was no actual notice of the suit to Karen Sue O'Brien or the O'Brien Entities and the Trial Court lacked authority to render any judgments against Karen Sue O'Brien or the O'Brien Entities and erred in its continuation of the proceedings against Petitioner Charles William O'Brien without the aforementioned indispensable parties.

More importantly however, was the error committed by the Trial Court and ratified by the Tenth District Court of Appeals of Ohio whereby Petitioner Charles William O'Brien was somehow held accountable for filings admittedly never served upon Petitioner Charles William O'Brien; and refused to be given to Petitioner Charles William O'Brien. The very idea that Petitioner Charles William O'Brien would be and has been

denied a trial on the merits by virtue of Bank One's failure and refusal to properly or otherwise provide Petitioner Charles William O'Brien with Court filings is a very dangerous precedent which is in direct conflict with Petitioner Charles William O'Brien's procedural and substantive constitutional rights to notice and due process. Accordingly, this case should be remanded to the Trial Court with instructions to dismiss for failure to join and properly serve indispensable parties and to reverse its judgment against Petitioner Charles William O'Brien where such judgments are based upon unserved filings.

Respectfully submitted,



Gina M. Dougherty (DOU 13)
Supreme Court No. 0022195
336 South High Street
Columbus, Ohio 43215
(614) 461-6300

THE SUPREME COURT OF OHIO

1992 TERM

To wit: May 27, 1992

Bank One, Columbus, N.A., Appellee,	:	Case No. 92-440
v.	:	
Charles William O'Brien et al., Appellants.	:	E N T R Y

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Franklin County to certify its record. Upon consideration of appellee's motion to dismiss,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, sustained.

IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

COSTS: Motion Fee, $40.00, paid by Keila Weakley.

(Court of Appeals Nos. 91AP166 & 91AP441)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank One, Columbus, N.A.,	:	
	:	Nos. 91AP-165
Plaintiff-Appellee,		and
	:	91AP-440
v.		
	:	(REGULAR CALENDAR)
Charles William O'Brien and Karen Sue O'Brien et al.,	:	
	:	
Defendants-Appellants.		
	:	
F&S Properties, et al.,		
Defendants-Appellants.	:	

OPINION

Rendered on December 31, 1991

VORYS, SATER, SEYMOUR AND PEASE, and MR. MICHAEL W. DONALDSON, for appellee Bank One, Columbus, NA.

MR. CHARLES WILLIAM O'BRIEN, pro se.

SCHWARTZ, KELM, WARREN & RUBENSTEIN, MR. NELSON E. GENSHAFT and MR. D. DAVID CARROLL, for appellee Freedom Savings Association, F.A.

McGRATH, KAUFMAN, HATCHER CO., L.P.A., MR. THOMAS R. McGRATH and MR. ERIC J. WITTENBERG, for appellees Merit Savings Association and Lyndon Guaranty Bank.

APPEALS from the Franklin County Court of Common Pleas.

PETREE, J.

Appellant Charles William O'Brien appeals from a judgment of the Franklin County Court of Common Pleas taken by default pursuant to Civ. R. 37(B)(2)(c). In support of the default judgment, the court cited O'Brien's continuing failure to provide adequate answers to Bank One's interrogatories and his refusal to pay sanctions levied against him by the trial court.

The primary issues on appeal are whether this action was properly commenced against O'Brien under Civ. R. 3(A), whether the trial court erred and abused its discretion when it granted a default judgment under these circumstances, and whether the trial court erroneously dismissed O'Brien's counterclaim after he had filed a voluntary notice of dismissal under Civ. R. 41(A). Finding merit only in the latter contention, we affirm the judgment of default but reverse the dismissal of O'Brien's counterclaim.

This action was brought by appellee Bank One to obtain judgment and foreclosure on three notes and mortgage deeds executed by O'Brien and his wife, Karen Sue O'Brien. Bank One's first amended complaint was filed on June 9, 1989 and named fifteen defendants in addition to the O'Briens. Among the other defendants named in the complaint were five incorporated and unincorporated entities allegedly controlled by O'Brien, collectively referred to as the corporate defendants, and several banking institutions, Merits Savings Association,

Lyndon Guaranty Bank, and Freedom Savings Association, later filed cross-claims against O'Brien and they will be hereinafter referred to as the cross-claim plaintiffs.

In its complaint, Bank One stated that in return for monies loaned to O'Brien, it was given mortgages on eighteen different properties. Bank One alleged that O'Brien had fraudulently executed and recorded releases of these mortgages. The complaint further alleged that, having fraudulently released Bank One's liens upon his property, O'Brien conveyed the property to the corporate defendants. O'Brien is currently in default under the three notes held by Bank One. By this action, Bank One sought to reinstate its mortgages on the eighteen properties, to set aside the conveyances of those properties in accordance with the notes and mortgage deeds executed by O'Brien.

Disputes between O'Brien and Bank One as to the scope and extent of discovery began almost immediately after the case was filed. These disputes were to continue throughout

the litigation of this case and would ultimately result in the default judgment which is the subject of this appeal. Early in the case, Bank One and O'Brien each served a set of interrogatories and a request for the production of documents upon the other. Bank one responded promptly to the request for production and somewhat belatedly to the interrogatories. O'Brien, however, completely failed to respond to Bank One's first set of interrogatories served on him December 30, 1989. On March 9, 1990, Bank One filed a motion to compel discovery, which the trial court granted on May 18, 1990. After being ordered a second time to answer the interrogatories on July 27, 1990, O'Brien filed his responses on August 3, 1990.

Bank One's first set of interrogatories had proposed only eight questions, six of which were designed to enable Bank One to obtain proper service on Karen Sue O'Brien and the corporate defendants. Bank One asked that O'Brien provide a present residence address for his wife, Karen Sue O'Brien, and

a business address and details of ownership for each of the five corporate defendants. In his responses to the interrogatories, O'Brien objected to each and every question and completely refused to provide a residential address for his wife, citing the privilege of confidentiality between spouses. O'Brien supplied answers to most of the remaining questions, but he prefaced each answer with the words "last known to be." With regard to Bank One's request that he identify the records custodian for each of the corporate defendants, O'Brien answered, "unknown, will supplement if determined by this answering party."

On August 17, 1990, Bank One moved to compel O'Brien to provide complete and non-evasive answers to its interrogatories. In its motion, Bank One complained that O'Brien's use of the words "last known" in his responses was an evasive tactic intended to thwart discovery. Bank One sought an order requiring O'Brien to make reasonable investigation and to delete the words "last known" from his answers. Bank One also demanded that O'Brien provide a residential address

for his wife, that he provide an address for each of the persons identified in his answers, and that he identify the records custodian for each of the corporate defendants. In response, O'Brien claimed that he had, in fact, made a reasonable inquiry and that he had answered the questions to the best of his knowledge. O'Brien also filed his own motion to compel discovery in which he maintained that Bank One's answers to his interrogatories had been untimely, incomplete and evasive.

On August 13, 1990, O'Brien filed a lengthy counterclaim and third-party complaint against Bank One and its officers and employees. One hundred eighteen pages in length, the document set forth fifteen claims for relief, five of which were explicitly based on alleged violations of federal law. The counterclaim also included thirty-eight pages of factual allegations, many of which were wholly unrelated to any of the fifteen claims for relief.

Bank One responded to O'Brien's counterclaim on December 21, 1990. In addition to an answer denying the

allegations, Bank One filed a motion to strike under Civ. R. 12(F) and a motion to dismiss for failure to state a claim under Civil R. 12(B)(6). The motion to strike concerned a number of factual allegations which were allegedly immaterial, impertinent and scandalous.

Bank One also moved to dismiss all of O'Brien's claims against Bank One's officers and employees and all but five of O'Brien's claims against Bank One for failure to state a claim upon which relief can be granted. In addition, both motions asserted that O'Brien's conduct in filing the counterclaim and third-party complaint had been frivolous and that attorney fees should be awarded under R.C. 2323.51

The trial court scheduled a hearing for January 4, 1991, at which time the court planned to rule on all motions filed on or before December 10, 1990. At the hearing, the court considered motions to compel discovery filed by both parties. In its rulings journalized January 18, the court denied O'Brien's motion and granted Bank One's motion to compel discovery.

Specifically, the court determined that O'Brien had failed to answer completely and non-evasively Bank One's first set of interrogatories. O'Brien was ordered to supply adequate responses by January 14, 1991. Because Bank One's motions to strike and dismiss O'Brien's counterclaim were filed after the deadline set for the hearing date, the court ruled that theses motions would be set for a non-oral hearing on January 14, 1991.

On January 18, 1991, the court held an unscheduled hearing to resolve an unrelated discovery dispute between Bank One and O'Brien. At this hearing, the court informed O'Brien that his counterclaim had been dismissed and that the court planned to filed the judgment entry later that afternoon. Following the hearing, O'Brien voluntarily dismissed his counterclaim and third-party complaint pursuant to Civ. R. 41(A). The trial court did not file its judgment entry dismissing the counterclaim until four hours later. The trial court ruled that all fifteen counts in O'Briens' counterclaim

failed to state claims recognizable under Ohio law and that certain other portions of the counterclaim should be stricken pursuant to Civ. R. 12(F). The court also found O'Brien's conduct frivolous and assessed $7,750 in attorney fees, which O'Brien was ordered to pay within ten days.

O'Brien failed to answer the interrogatories or pay the sanctions as ordered. On January 29, 1991, Bank One filed a motion for a default judgment pursuant to Civ. R. 37(B)(2)(c). In support of its motion, Bank One cited O'Brien's failure to respond to the interrogatories or pay the assessed attorney fees as ordered. One day later, the court issued a judgment entry which again ordered O'Brien to answer the interrogatories and pay the attorney fees. The court also gave notice that should O'Brien fail to comply, the court would consider Bank One's motion for a default judgment without further notice on February 7, 1991. In response, O'Brien transmitted a second set of responses to Bank One's first set of interrogatories by telefax on February 6, 1991. In this single page document,

O'Brien repeated his objection to the first question regarding his wife's address and denied having any knowledge whatsoever regarding the rest of the questions.

On February 7, 1991, the court held a hearing and granted a default judgment for each of the reasons raised in Bank One's motion. Five days later, the court held a damages hearing at which Bank One offered proof to support its claims against O'Brien. The court allowed O'Brien to cross-examine the witnesses offered by Bank One but prohibited him from testifying or presenting witnesses in his own defense. Following the hearing, the court granted judgment and foreclosure against O'Brien on each of the three notes and mortgage deeds. The court also granted a default judgment against the five corporate defendants, which judgment is the subject of a separate appeal in this court. Because the cross-claims of the other banking institutions were still pending, the court included in the judgment entry a notation that there was no just cause for delay under Civ. R. 54(B). From this

judgment, O'Brien filed a notice of appeal in this court. One month later, the trial court issued an amended judgment entry on March 12, 1991. Acting on Bank One's motion, the trial court amended the original judgment entry by attaching an exhibit which listed the deeds to be set aside under the judgment. Leave to amend the judgment entry was not, however, obtained from this court as required by Civ. R. 60(A). O'Brien then took a second appeal to this court which we consolidated with the first appeal for purposes of hearing and determination.

Throughout these proceedings and in this appeal, O'Brien has chosen to represent himself pro se. This is his right. However, we hasten to add that in choosing to represent himself, O'Brien will be held to the same standards applied to the members of the bar. A civil pro se litigant will be accorded no greater, nor lesser, rights than those litigants who retain counsel. Meyers v. First Natl. Bank (1981), 3 Ohio App. 209, 210. With this in mind, we proceed to

consider O'Brien's fifteen assignments of error, which state:

> "1. The Trial Court abused its discretion and committed prejudicial error against Defendant-Appellant Charles William O'Brien by granting Default Judgment or taking any other action against Defendant-Appellant Karen S. O'Brien without jurisdiction over the person of Defendant-Appellant Karen S. O'Brien as Defendant-Appellant Karen S. O'Brien was and is an indispensable party to the action and Defendant-Appellant Charles William O'Brien's substantive rights therein; and any such action taken by the Trial Court, without jurisdiction over the person of Defendant-Appellant Karen S. O'Brien, was and is void ab initio as to Defendant-Appellant Charles William O'Brien.
>
> "2. The Trial Court abused its discretion and committed prejudicial and reversible error by granting Default Judgment and other remedies against Defendant-Appellant Charles William O'Brien without proper notice or pertinent jurisdiction over the 'person' of Defendant-Appellant Charles William O'Brien or 'subject matter' of the various Motions which gave rise to the adverse Decisions by the Trial Court, in addition to rendering such action by the Trial Court void ab initio.
>
> "3. The Trial Court abused its discretion and committed prejudicial error by considering Motions filed by Plaintiff-Appellee Bank One, Defendant-Appellee Merit Savings Association (Defendant-Appellee Merit), Defendant-Appellee

Lyndon Guaranty Bank (Defendant-Appellee Lyndon) and Defendant-Appellee Freedom Savings Association (Defendant-Appellee Freedom), without leave of Court under Franklin County Court of Common Pleas Local Rule 25.04.

"4. The Trial Court abused its discretion and committed prejudicial error by dismissing Defendant-Appellant Charles William O'Brien's Counterclaim and Third Party Complaint in that the Trial Court failed to apply the same standards of compliance as between Defendant-Appellant Charles William O'Brien and Plaintiff-appellee Bank One regarding discovery and sanctions in violation of Civil Rules 1, 4.3, 4.6, 5, 6, 11, 33, 34, 37, 37(B)(2)(c), 41(B)(1), 42, 45, 52, 55, 58, 83 and applicable Ohio Case Law.

"5. The Trial Court denied Defendant-Appellant Charles William O'Brien's rights to due process and equal protection by its failure and refusal to permit Defendant-Appellant Charles William O'Brien to engage in timely discovery related to issues raised by Plaintiff-Appellee Bank One, thereby ignoring Ohio law as it relates to such rights.

"6. The Trial Court abused its discretion and committed prejudicial and reversible error by considering and granting Plaintiff-Appellee Bank One's Motion for Default Judgment and Dismissal prior to the time permitted for Defendant-Appellant Charles William O'Brien's response thereto, in disregard of Defendant-

Appellant Charles William O'Brien's pending Appeal and in contravention of Civil Rules 1, 3, 5, 6, 11, 33, 37(B)(2)(c), 37(D), 41(B)(1), 55, 58, 83 and Local Rule 25.04.

"7. The Trial Court abused its discretion and committed prejudicial and reversible error by confusing Defendant-Appellant Charles William O'Brien as to Defendant-Appellant Charles William O'Brien's obligations to respond to non-journalized Orders, Orders journalized after the time for response had run, Orders which were contradicted by related Entries and Entries which were contradicted by related Orders, in contravention of Ohio Case Law and Civil Rules 1, 4.3, 4.6, 5, 6, 11, 58, 83.

"8. The Trial Court abused its discretion and committed prejudicial error by granting Plaintiff-Appellee Bank One's Motion to Dismiss the Verified Amended Counterclaim and Third-Party Complaint of Defendant-Appellant Charles William O'Brien, in contravention of Civil Rules 1, 4.3, 4.6, 5, 6, 12, 41, 52, 58, 83 and applicable Ohio Case Law, inasmuch as, prior to the filing of the Trial Court's Journal Entry, Defendant-Appellant Charles William O'Brien had already dismissed the Counterclaim and Third-Party Complaint under Civil Rule 41(A)(1) [and] (C).

"9. The Trial Court abused its discretion and committed prejudicial error by striking certain portions of Defendant-Appellant Charles William O'Brien's Verified Amended Counterclaim and Third-Party Complaint, in contravention of Civil Rules 1, 4.3, 4.6, 5, 6, 12(F), 41, 52, 58, 83 and applicable Ohio Case Law, inasmuch as, prior thereto, Defendant-Appellant Charles William O'Brien had filed a Dismissal of the Counterclaim and Third-Party Complaint under Civil Rule 41(A)(1) [and] (C).

"10. The Trial Court abused its discretion and committed prejudicial and reversible error by misapplying the Civil Rules regarding the allowance of Plaintiff-Appellee Bank One's Amended Complaints in contravention of Civil Rules 1, 3, 4.3, 4.6, 5, 6, 11, 15, 17, 19, 19.1, 21, 25, 52, 83 and applicable Ohio Case Law.

"11. The Trial Court denied Defendant-Appellant Charles William O'Brien's rights to due process and equal protection by its failure to apply the proper standards by which Plaintiff-Appellee Bank One's Amended Complaint should be allowed thereby ignoring Ohio case law as it relates to such standard its consequent prejudice to Defendant-Appellant Charles William O'Brien.

"12. The Trial Court abused its discretion and committed prejudicial and reversible error and a denial of Defendant-Appellant Charles William O'Brien's due process rights by considering the filings of any parties in the United Sates District

Court, Southern District, Eastern Division as being filed with the Clerk of the Franklin County Court of Common Pleas and by considering service of filings to an improper address relative to Defendant-Appellant Charles William O'Brien as proper notice and due process.

"13. The Trial Court abused its discretion and committed prejudicial and reversible error and a denial of Defendant-Appellant Charles William O'Brien's due process rights by permitting Plaintiff-Appellee Bank One to introduce any evidence of damages or related proof thereof, by any document or witness at the damage hearing of February 12, 1991 and in overruling Defendant-Appellant Charles William O'Brien's Motion for Default, to Dismiss and Motion in Limine.

"14. The Trial Court abused its discretion and committed prejudicial and reversible error by considering, signing and causing the Amended Judgment Entry and Decree in Foreclosure to be journalized on March 12, 1991, resulting in such Amended Entry being a legal nullity and void.

I.

In his first assignment of error, O'Brien maintains that no judgment may be taken against him because Bank One's action was not properly commenced against Karen Sue O'Brien

under Civ. R. 3(A). That rule provides that "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing ***." Although O'Brien concedes that Bank One has properly commenced its action against him, he argues that Bank One failed to commence its action against Karen Sue O'Brien because it failed to complete service by publication within one year of filing its first amended complaint. Ordinarily, where an action has been properly commenced against one party, that party cannot assert as a defense the failure to commence the action against a co-party. However, an exception to this rule exists where the complaining party asserts that the co-party against whom the action has not been properly commenced is an indispensable party in whose absence the action cannot proceed. See Civ. R. 19. Because O'Brien alleges that his wife is an indispensable party and that the action should not proceed in her absence, we must determine whether this action was properly commenced against her under Civ. R. 3(A).

The record indicates that Bank One's first amended complaint was filed on June 9, 1989. Unable to locate Karen Sue O'Brien, Bank One filed a motion for leave to file a second amended complaint on June 22, 1990. The second amended complaint was identical to its predecessor in all material respects and its explicit purpose was to obtain an additional year within which to complete service under Civ. R. 3(A). Leave was granted and Bank One filed the second amended complaint on September 6, 1990. Service by publication was completed upon Karen Sue O'Brien on October 19, 1990.

Because Bank One completed service on Karen Sue O'Brien more than one year after filing its first amended complaint, O'Brien contends that the action against his wife failed for lack of commencement. On the other hand, Bank One insists that it obtained an additional year within which service could be made under Civ. R. 3(A) when it filed the amended complaint with leave of court. For this proposition, Bank One relies on Goolsby v. Anderson Concrete Corp.

(1991), 61 Ohio St. 3d 549. In that case, the plaintiff filed a complaint but instructed the clerk not to make service on the named defendant. Seventeen months later, the clerk was instructed to and did make service on the defendant. Although the plaintiff had failed to make service within one year as required by Civ. R. 3(A), the court nevertheless held that the action had been properly commenced. Observing that the plaintiff could have obtained an additional year within which to make service by filing a voluntary notice of dismissal and then refiling the action, the court held that an instruction by the plaintiff to attempt service is equivalent to refiling the cause of action for purposes of Civ. R. 3(A). Applying Goolsby to the facts of this case, we hold that filing an amended complaint is also equivalent to refiling the complaint that this action gave Bank One an additional year within which to make service under Civ. R. 3(A). Accordingly, we reject O'Brien's contention that the action against his wife failed for lack of commencement and that this undermined Bank One's judgment

against him.

The first assignment of error is not well-taken.

II.

The fourth, fifth and sixth assignments of error concern the central issue in this case -- whether the trial court erred and abused its discretion when it granted judgment by default against O'Brien pursuant to Civ. R. 37(B)(2)(c). In support of its motion for default judgment, Bank One cited O'Brien's failure to provide complete and non-evasive answers to Bank One's first set of interrogatories. In this appeal, O'Brien contends that he was not given sufficient notice of the court's intention to grant a default judgment and that the court abused its discretion when it granted the most severe remedy allowed under Civ. R. 37(B), judgment by default.

Civ. R. 37(B) authorizes the court to impose a variety of sanctions where "*** a party fails to obey an order to provide or permit discovery ***." Possible sanctions include an award of reasonable expenses and attorney fees, an order

prohibiting the introduction of designated matters into evidence, and an order striking selected claims or defenses. In extreme cases, the court may dismiss the action or render judgment by default against the disobedient party. Civ. R. 37(B)(2)(c). The selection of an appropriate sanction is a matter committed to the discretion of the trial court. However, the court must be particularly careful when it imposes the harsh remedies of dismissal and default. Because Ohio law favors the disposition of cases on their merits, the most severe sanctions should be reserved for those cases where there is evidence of willfulness or bad faith. Toney v. Berkemer (1983), 6 Ohio St. 3d 455, syllabus; Sedgwick v. Kawasaki Cycleworks, Inc. (1985), 24 Ohio App. 3d 109, 111. Where the failure to comply is neither willful nor in bad faith, the trial court should consider the alternative sanctions set forth in Civ. R. 37(B)(2)(a), (b), and (d). On appeal, we review the trial court's choice of sanctions for an abuse of discretion. Ward v. Hester (1973), 36 Ohio St. 2d 38. Thus, the

judgment will be affirmed absent some showing of an unreasonable, arbitrary or unconscionable attitude of the trial court. Klever v. Red Bros. Express, Inc. (1951), 154 Ohio St. 491.

When the sanction chosen by the trial court is a dismissal with prejudice pursuant to Civ. R. 37(B)(2)(c) the Supreme Court has imposed an additional hurdle, requiring that the court give the non-complying party advance notice of its intention to dismiss the action. In Ohio Furniture Co. v. Mindala (1986), 25 Ohio St. 3d 99, the court observed that a "dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice." Id. at 101. The court concluded that the notice requirement of Civ. R. 41(B)(1) applies to all dismissal with prejudice, including those entered pursuant to Civ. R. 37(B)(2)(c). The court explained that:

> "This holding stems from and reflects 'a basic tenet of ohio jurisprudence that cases should be

decided on their merits.' Perotti v. Ferguson (1983), 7 Ohio St. 3d 1, 3. Notice of intention to dismiss with prejudice gives the non-complying party one last chance to obey the court order in full. The moving party should not be allowed to circumvent this protection by simply framing his motion in terms of a Civ. R. 37. Nor should a trial court on its own motion dismiss on the merits without prior notice." Id. at 101.

There is some question whether Mindala, supra, apples to judgments rendered by default as well as those rendered by dismissal. Although Civ. R. 41 is not specifically applicable to default judgments, some form of notice is certainly required. In any case, the trial court's journal entry filed on January 30, 1991 satisfied the notice requirement set out in Mindala by warning O'Brien that, should he fail to adequately respond to the first set of interrogatories or pay the assessed attorney fees

as previously ordered, the court would consider Bank One's motion for default judgment.

The first reason cited by Bank One in its motion for default judgment involves O'Brien's failure to pay attorney fees awarded as a sanction for his frivolous conduct. O'Brien does not deny that he failed to pay the fees. Rather, O'Brien asserts that the award was improper to begin with. We agree. R.C. 2323.51(B)(2) specifically provides that an award of attorney fees may be made only after the court: (a) sets a date for a hearing to determine whether particular conduct is frivolous; (b) gives notice of the date of the hearing; and (c) conducts the hearing, allowing each party to present any relevant evidence at that time. Here, the court explicitly set the motion for a non-oral hearing date. The court then proceeded to find O'Brien's conduct frivolous and to determine the amount of the award based only upon its review of the record and motions before it. This was error. Before making an award of attorney fees for frivolous conduct under R.C. 2323.51, it is mandatory

that the court conduct a hearing as provided in the statute. Stephens v. Crestview Cadillac, Inc. (1989), 64 Ohio App. 3d 129, 132; Spangler v. Redick (July 18, 1991), Franklin App. No. 90AP-406, unreported (1991 Opinions 3375). Because the court failed to conduct the required hearing, it erred in awarding attorney fees for O'Brien's allegedly frivolous conduct. There being no valid award of attorney fees, it was also error to impose sanctions under Civ. R. 37(B) based upon O'Brien's failure to pay the award of attorney fees.

The second justification for the default judgment lies in O'Brien's failure to provide complete and non-evasive answers to Bank One's first set of interrogatories. These interrogatories were first served on him December 30, 1989. It took seven months and two orders compelling discovery before O'Brien filed his first set of responses in August 1990. As the trial court later held, these responses were incomplete and evasive. The court issued a third order compelling discovery on January 18, 1991. When O'Brien once again failed to comply, the trial

court specifically warned him that further disobedience might result in a default judgment. O'Brien's response was both untimely and inadequate. He simply repeated his contention that his wife's residential address was protected by spousal privilege and claimed to have no further information as to any of the other questions. At the hearing held to consider Bank One's motion for default judgment, O'Brien stood by his previous responses to the interrogatories.

A party's persistent refusal to provide complete and nonevasive answers to an opposing party's interrogatories may warrant the imposition of sanctions under Civ. R. 37(B), including dismissal of the action or the entry of a judgment by default. Eg. Loynd v. Scott Molders, Inc. (1990), 62 Ohio App. 3d 888; ConTex, Inc. v. Topper (1988), 40 Ohio App. 3d 97. In this case, the trial court correctly ruled that a residential address is not a confidential communication protected by spousal privilege. In spite of this ruling, O'Brien persisted in his refusal to answer this and other interrogatories proposed by

Bank One. Having once been ordered to provide discovery, a party cannot stand upon the same objection previously give. Russo v. Goodyear Tire & Rubber Co. (1987), 36 Ohio App. 3d 175, 179. When a party failed to comply with an order compelling discovery, it is that party's burden to show that the continued refusal to comply is genuinely founded upon a good faith excuse and is not the result of willfulness or bad faith. Id. O'Brien failed to provide any good faith excuse for his defiance of the trial court's order. Furthermore, O'Brien's history of non-compliance with legitimate discovery requests supports a finding of willfulness and bad faith which O'Brien completely failed to rebut at the hearing on February 7, 1991.

After a thorough review of the extensive record in this case, we also conclude that the trial court did not abuse its discretion when it chose to grant a default judgment in lieu of other less severe sanctions allowed under Civ. R. 37(B). Once a court finds a party in default of an order compelling discovery, the court may consider the entire history of the case

to determine the appropriate sanction. Reviewing the tortured history of this case on appeal, we are convinced that the trial court acted correctly under the circumstances. Although the file is immense, very little of it has any relation to the merits of Bank's claims or O'Brien's defenses. Instead, the parties have engaged in absurd procedural battles over leave of court, forms of service, correct mailing addresses and other intricacies of motion practice. Most, but by no means all, of these issues arose as a result of O'Brien's litigious and dilatory conduct. This is O'Brien's fourth appeal to this court, the other three being taken from interlocutory orders and dismissed accordingly. Rather than comply with the trial court's reasonable discovery orders, O'Brien has made it a practice to file an affidavit of prejudice against the trial judge following each unfavorable decision. He has also filed separate lawsuits against both the trial judge and opposing counsel. Needless to say, this kind of behavior is totally inappropriate, whether undertaken by a member of the bard or a pro se litigant.

When this case was remanded to the court of common pleas following O'Brien's unsuccessful attempt to remove it to the United States District Court for the Southern District of Ohio, Judge Kinneary observed that the "time has come for this avalanche of vindictive legal gamesmanship to end." We wholeheartedly agree. O'Brien's frivolous conduct throughout this lawsuit, and in particular his refusal to comply with the trial court's discovery orders, amply warrants the ultimate sanction for misconduct under Civ. R. 37(B), judgment by default.

The fourth, fifth and sixth assignments of error are not well-taken.

O'Brien's final complaint with respect to the default judgment against him concerns the court's ruling on his own motion for sanctions under Civ. R. 37(B). In his interrogatories to Bank One, O'Brien asked that Bank One identify each expert witness, each lay witness, and each exhibit it planned to introduce at trial. Bank One objected to all three

questions, noting that it was too early in the case to intelligently respond. O'Brien filed a motion to compel Bank One to respond to these questions, but that motion was denied by the trial court. On January 7, 1991, O'Brien asked that Bank One supplement its prior responses to his interrogatories. Bank One, however, did not respond to this request. At the damages hearing held on February 12, 1991, O'Brien moved for an order preventing Bank One from introducing into evidence any witness or exhibit not previously identified. In response, Bank One stated that it planned to offer no expert witnesses. As to the other two questions, Bank One maintained that the civil rules did not require a party to identify exhibits or general witnesses. The trial court denied the motion. In this court, O'Brien asserts that the trial court abused its discretion when it denied his motion for sanctions under Civ. R. 37(B).

Civ. R. 26(E)(3) imposes upon the party a duty to supplement prior responses to interrogatories upon the receipt of a request for supplementation. As required under the rule, O'Brien made a proper request for supplementation, but Bank One failed to file a response. Bank One's contention that it has no duty to disclose the identity of general witnesses or the nature of exhibits is particularly disingenuous given the fact that Bank One posed these same questions to O'Brien in its second set of interrogatories. Thus, it is distressing to find that Bank One, which obtained a default judgment based upon O'Brien's failure to answer interrogatories, has itself unjustifiably refused to answer O'Brien's interrogatories. Nevertheless, we find no prejudicial error here. Each of the witnesses and exhibits introduced at the hearing by Bank One had been previously deposed or examined by O'Brien. Accordingly, there was no surprise and no error prejudicial to O'Brien's substantial rights.

The thirteenth assignment of error is not well-taken.

III.

In eighth, ninth and eleventh assignments of error, O'Brien asserts that the trial court erroneously dismissed his counterclaim and third-party complaint with prejudice for failure to state a claim upon which relief can be granted. The record indicates that O'Brien filed a notice of voluntary dismissal pursuant to Civ. R. 41(A) after being informed of the court's decision to dismiss his counterclaim but several hours before the trial court journalized its decision.

A defendant in a civil action has an absolute right to voluntarily dismiss a counterclaim one, without prejudice, anytime before the commencement of trial. Civ. R. 41(A) and (D). It is well-established that the court is without authority to enter a dismissal with prejudice after a party has exercised its right to voluntarily dismiss an action under Civ. R. 41(A). Standard Oil Co. v. Grice (1975), 46 Ohio App. 2d 97; Huntington National Bank v. Abbott (Sept. 26, 1989), Franklin

App. No. 89AP-432, unreported (1989 Opinions 3554). This is so even where the court has previously issued a decision dismissing a claim but has not yet filed a judgment entry to that effect. Grice, supra. A court speaks only through its journal entry, and until journalized, a court's decision can have no effect on a party's right to voluntarily dismiss an action pursuant to Civ. R. 41(A). Torres v. Sears, Roebuck & Co. (1980), 68 Ohio App. 2d 87. O'Brien also contends that his counterclaim did, in fact state one or more claims for relief. However, these contentions are moot in light of O'Brien's own prior dismissal of the counterclaim. Accordingly, we find that the trial court's judgment dismissing O'Brien's counterclaim was error. That judgment will be set aside and the voluntary dismissal reinstated.

The eighth and ninth assignments of error are well-taken and the eleventh assignment of error is not well-taken.

IV.

The final seven assignments of error assert a variety of alleged procedural errors. In the second assignment of error, O'Brien argues that the trial court was without jurisdiction to consider motions filed by Bank One which were served on O'Brien by certified mail rather than regular mail. Civ. R. 5(B) provides that service of pleadings and motions subsequent to the original complaint may be made by mailing them to the party's last known address. The rule neither directs that service be made by ordinary mail, nor does it prohibit the use of certified mail. Accordingly, the movant is free to select either method of service.

The second assignment of error is not well-taken.

In the third assignment of error, O'Brien maintains that the trial court erred when it ruled on motions filed by Bank One without leave of court first obtained pursuant to Loc. R. 25.04 of the Franklin County Court of Common Pleas. Until its amendment in July 1991, Loc R. 25.04 provided that "no motion shall be filed in any case after it has been set for trial

or pre-trial without leave of the trial judge first obtained, who may establish the times for the filing of briefs and submission of the motion." After a trial date was set in this case, both parties filed a number of motions without leave of court. Because the trial court never granted leave with respect to any of these motions, O'Brien contends that none of them were properly before the court. We disagree. Notwithstanding the provisions of Loc. R. 25.04, we are of the opinion that no local rule can authorize a trial court to refuse to allow the submission of motions to compel discovery and for sanctions under Civ. R. 37. Such a rule would be inconsistent with the Civil Rules and therefore void. Loc. R. 25.04 merely authorizes the court to establish a schedule for the filing and submission of motions and memoranda. Although it never granted leave of court, the trial court did set several oral and non-oral hearing dates for the purpose of ruling on accumulated motions. Given our holding that leave of court is not required to file a motion under Civ. R. 37 and the fact that the court

did establish dates for the submission of motions, we find no prejudicial error in the trial court's consideration of motions filed without leave of court pursuant to Loc. R. 25.04.

The third assignment of error is not well-taken.

In the seventh assignment of error, O'Brien launches a broad-based attack on at least fifteen different judgment entries entered in this case. Many of the alleged procedural irregularities raised in this assignment of error have already been addressed. With regard to the other contentions, we find no prejudicial error.

The seventh assignment of error is not well-taken.

The fourteenth assignment of error challenges the amended judgment entry, journalized by the trial court more than one month after O'Brien filed his notice of appeal in this court. O'Brien has also filed a motion in this court seeking an order striking the amended judgment entry from the record. Acting pursuant to Civ. R. 60(A), the trial court corrected an omission in the original judgment entry by attaching an exhibit

which specifically set forth the deeds to be set aside as directed in the judgment. O'Brien contends that the amended judgment entry must be held null and void because the trial court was divested of jurisdiction to modify or correct the judgment during the pendency of this appeal. For this proposition, O'Brien relies on the judgment of Cuyahoga County Court of Appeals in Vavrina v. Greczanik (1974), 40 Ohio App. 2d 129. In Vavrina, the court held that a trial court lacks jurisdiction to act on a motion for relief from judgment filed pursuant to Civ. R. 60(B) during the pendency of an appeal. This court has, however, declined to follow the reasoning set out in Vavrina and its progeny. Eg. Stickney v. Ervin (Dec. 5, 1989), Franklin App. No. 89AP-616, unreported (1989 Opinions 4596); In re Estate of Davis (Dec. 20, 1979), Franklin App. No. 79AP-731, unreported (1979 Opinions 4098). Instead, we have held that a trial court retains jurisdiction to consider a motion for relief from judgment filed under Civ. R. 60(B) during the pendency of an appeal because such a determination does not interfere

with our jurisdiction to proceed with the appeal. See In re Kurtzhalz (1943), 141 Ohio St. 432, paragraph two of the syllabus. Similarly, a trial court is not divested of jurisdiction to correct a judgment entry pursuant to Civ. R. 60(A). While that rule states that a trial court should obtain leave of the appellate court before correcting a judgment in which an appeal is pending, the failure to do so does not oust the trial court of jurisdiction; it merely constitutes an error reviewable on appeal. In this case, the error is non-prejudicial because the trial court's correction of the judgment entry in no way interfered with our jurisdiction and we would have granted leave had such a motion been filed.

The fourteenth assignment of error is not well-taken and the motion to strike the amended judgment entry is overruled.

Finally, in the tenth, twelfth and fifteenth assignments of error, O'Brien raises issues which concern claims and motions filed by the crossclaim plaintiffs, Merit Savings Association, Lyndon Guaranty Bank and Freedom Savings

Association. These issues are not properly before this court. Pursuant to Civ. R. 54(B), the trial court rendered final judgment only on Bank One's claims against O'Brien, his wife, and the corporate defendants. No final judgment was rendered with regard to the claims asserted by the cross-claim plaintiffs and these claims were still pending before the trial court when these appeals were filed. Accordingly, this court lacks jurisdiction to review issues concerning these parties due to the lack of a final appealable order.

The tenth, twelfth and fifteenth assignments of error are not well-taken.

For the foregoing reasons, the eighth and ninth assignment of error are sustained, the judgment of the Franklin County Court of Common Pleas dismissing O'Brien's counterclaim is reversed and set aside, and the voluntary dismissal is reinstated. The remaining assignments of error and the motion to strike the amended judgment entry are overruled and the judgment against O'Brien on Bank One's

second amended complaint is affirmed.

Judgments affirmed in part,
reversed in part and motion overruled.

STRAUSBAUGH and BRYANT, JJ., concur.

Further, such subsection (B) states that "Service by mail is complete upon mailing."

The question as presented here is whether registered mail, usually considered as a higher form of mail, may be held, at least in construing service under Civ. R. 56(C), to constitute complete service upon mailing.

We hold that service of a motion by mail, pursuant to Civ. R. 5, contemplates the use of regular mail rather than certified mail. As noted in McCormac, Ohio Rules of Civil Practice, at section 6.07, Service of Motion, "*** Service upon either the attorney or a party may be made by ordinary mail and service complete upon mailing."

We believe that a requirement that a notice of a hearing for summary judgment be sent out by regular mail, where there has been an unclaimed or refused certified mailing, is equally as important as the requirement under Civ. R. 4.6 that, where service of process by certified mail shows a refusal

thereof, service by ordinary mail must follow. Only upon entering the fact of the regular mailing of the process may service be deemed to be complete.